Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-296

MICHAEL K. SCHMIER and
MICHAEL K. SCHMIER, A PROFESSIONAL
CORPORATION, Petitioners,

v.

TERRY S. KAPLAN, MICHAEL A. LOTMAN,
COLLISSON & KAPLAN, LAWRENCE BROOKS,
BROOKS INDUSTRIES, INC., Respondents

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. v. Superior Court,
182 Cal.App.3d 431 (1986) 1

Bird v. Superior Court, 112 Cal.App.3d 595
(1980) 1

International Jet Ski Boating Association, Inc.
v. Superior Court (4th Dist. 1991),
232 Cal.App. 3d 112 2

STATUTES

Code of Civil Procedure section 638 2

Code of Civil Procedure section 639 2

Law and Discovery Policy Manual For the
Superior Court County of Los Angeles,
subsection K, paragraphs 241, 243 & 244 2

The thrust of respondents' opposition is their incorrect[1] contention that the lower court case turned "upon factual issues of consent and waiver [and therefore it is unnecessary to reach the question of the constitutionality of the reference statute]. (Resp. Opp. pg. 11, lns. 17-18].

Paragraph 4 (Apx. pg. 8) of the Court of Appeal Discussion, regarding a preliminary and different objection--that the reference was not necessary--was the opinion's only mention of waiver:

> "[appellants] did not object to the lack of necessity when the trial court made its reference order, thus the argument was waived."

This is the only basis of any conclusion that "waiver and consent" could be inferred, a conclusion without authority. This did not follow Bird v. Superior Court, 112 Cal.App.3d 595 (1980) and Aetna Life Ins. Co. v. Superior Court, 182 Cal.App.3d 431 (1986), upon which

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[1]Likewise, respondents' opposition is filled with incorrect statements held out as facts, but rather which consist of respondents' contentions and not Court of Appeal findings. However, the limited purpose of this reply now does not include their itemization and refutation.

appellants relied from the beginning., see International Jet Ski Boating Association, Inc. v. Superior Court (4th Dist. 1991), 232 Cal.App. 3d 112.

And, contrary to any conclusion of consent to the reference, the trial court repeatedly stated on the record that:

"we don't have any agreement (consent) expressed from [petitioners]. . ."

(e.g., Tr. #2, pg. 7, ln. 28-pg. 8, ln. 15).

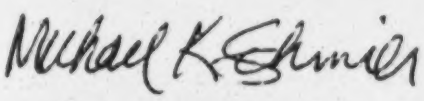
Moreover, consent or agreement is irrelevant as California Code of Civil Procedure specifies a forced reference, i.e. "without consent."

A reference of any other subject matter than those specifically named in section 639 can only be by agreement in writing and signed by all parties, not done here, Code of Civil Procedure section 638, Law and Discovery Policy Manual For the Superior Court County of Los Angeles, subsection K, paragraphs 241, 243 & 244.

Much more importantly, and as these cases hold, waiver of the necessity of the reference argument would have nothing to do with waiver of the jurisdictional

question as to the constitutionality of the statute. The question of constitutionality was never waived and this Court is urged to decide it so that many other people in the future will not be hurt by this.

Respectfully submitted,



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